# Severing reservations

# SEVERING RESERVATIONS

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ABSTRACT

How to address invalid reservations has been an on-going struggle for States, legal practitioners and academics. This article considers the evolution of severability and whether States intend the language of severance to serve as a signal of their view on legality to reserving States or simply use severability to bolster their own public reputation. Over the past decade, State practice toward invalid reservations to norm-creating treaties has shifted and this shift and its impact on treaty law must be acknowledged. The arguments and assertions that follow rely heavily on the contemporary practice relating to reservations made to the core UN human rights treaties which, admittedly, limits the application of the doctrine in many ways. Review of State practice, especially to human rights treaties, demonstrates that a broader number of States are slowly opting for severability when defining their treaty relations with States authoring invalid reservations. The doctrine of severability is gaining a slow but steady following by a growing number of States though there is tension about whether severing reservations is *lex specialis*, pertaining only to human rights treaties, or *lex ferenda*. This article examines the evolving practice and forecasts the role it will play in the future of treaty law.

KEYWORDS

Treaty law, reservations, invalid reservation, permissibility, severability, Vienna Convention on the Law of Treaties, human rights

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## I. INTRODUCTION

The legal effect of an invalid reservation has long been a source of angst for international legal practitioners and observers, particularly in relation to human rights treaties. States, too, have struggled with how to address invalid reservations stemming from impermissibility for failure to clear the hurdle of Article 19 of the 1969 Vienna Convention on the Law of Treaties[1] as well as other shortcomings in a purported reservation. As a result, States have traditionally resorted to either the permissibility or opposability doctrines in an effort to define the legal effect of an invalid reservation. In the past decade, however, certain States have warmed to the severability principle as a means of addressing the consequence of a reservation that fails to clear the permissibility hurdles imposed by Article 19. This subtle change in State practice marks a departure from the long-held position that States alone determine their own treaty obligations. Recourse to severing an invalid reservation amounts to a denial of a State's right to reserve against multilateral treaty obligations, a bedrock principle of customary international law.

This article considers the evolution of severability and whether States intend the language of severance to serve as a signal of their view on legality to reserving States or simply use severability to bolster their own public reputation. It also forecasts the role severability will play in the future of treaty law. The arguments and assertions that follow rely heavily on the contemporary practice relating to reservations made to the core UN human rights treaties which, admittedly, limits the application of the doctrine in many ways. Commentators often view the practice of severing reservations as *lex specialis* pertaining only to human rights treaties. Others suggest it is *lex ferenda* and the 2011 Guide to Practice on Reservations to Treaties[2] (Guide to

[1] (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention).
[2] ILC 'Guide to Practice on Reservations to Treaties' (2011) UN doc A/66/10, para 75 (Guide to Practice).

Practice) produced by the International Law Commission (ILC) give support to this view. The debates surrounding severability indicate that it is no longer a consequence limited to the European human rights system nor is the practice only attributable to a small, regional set of States. In the past decade State practice toward reservations to norm-creating treaties has shifted and this shift and its impact on treaty law must be acknowledged. Review of State practice, especially to human rights treaties, indicates that a broader number of States are slowly opting for severability when defining their treaty relations with States authoring invalid reservations.

The primary question addressed by this paper is whether the increasing recognition of the severance doctrine tracks a paradigm shift in customary international law? Underlying this question are two further inquiries asking who decides whether a reservation should be severed and what is the consequence of this decision? Whilst the bulk of the evidence of such a shift emanates from human rights treaties, the number of standard-setting treaties are on the rise and the doctrine is easily transferable. A doctrinal analysis of norm-setting, multilateral human rights treaties will serve as the empirical basis of this research. However, more nuanced trends will be tracked by examining the literature proffered by observers, States and the ILC. Though it is clear that severability has impacted obligations in regional human rights adjudicatory forums, the influence of the principle in the broader UN system is less obvious as it is difficult to follow a State's unilateral act of severing a reservation to its consequential end if the objecting State and reserving State do not take action to have the question resolved. Therefore, this article will examine the historical and contemporary practice of States in respect of invalid reservations and will pose suggestions as to the impact these practices may have on the customary international law of reservations.

To introduce the subject, section two will consider the historical underpinnings of the severability principle. This is followed by a summary of contemporary State practice in response to invalid reservations to human rights treaties in section three. Section four will be dedicated to examining the ILC Guide to Practice on Reservations to Treaties. Finally, section five will posit ideas on what the culmination of these trends means for international treaty practice. It will examine the impact on the doctrine and what the future holds for States authoring invalid reservations.

## II. HISTORICAL UNDERPINNINGS

The treaty that brought the issue of invalid reservations to the fore was the Convention on the Prevention and Punishment of the Crime of Genocide[3] (Genocide Convention). This treaty represented a new type of treaty designed to benefit and protect individuals rather than to provide rights for the benefit of States alone. In response to reservations formulated by States upon accession, such as the Philippines and Bulgaria which made reservations regarding the automatic dispute resolution mechanism found in Article IX of the Convention,[4] non-reserving States found themselves perplexed as to how to react to the various reservations formulated. The controversy stemming from these reservations has been attributed to the potential 'accounting problem' that arose as to at what point the Genocide Convention would enter into force since there were States that had ratified with reservations to which there had been objections.[5] To resolve the

[3] (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention).
[4] Both States made other interpretive declarations in addition to the reservations to the automatic referral to the ICJ in the event of a dispute among States. Bulgaria ultimately withdrew its reservation on 24 June 1992, see 78 UNTS 318. The Philippines continues to maintain the reservation.
[5] See UN Treaty Section of the Office of Legal Affairs 'Summary of the Practice of the Secretary-General as Depositary of Multilateral Treaties' (1999) UN doc ST/LEG/7/Rev.1, para 173; ET Swaine, 'Reserving' (2006) 31 Yale J Intl L 307, 312-3; WA Schabas, 'Reservations to Human Rights Treaties: Time for Innovation and Reform' (1994) 32 Canadian Ybk Intl L 39, 45; C Redgwell, 'Universality or Integrity? Some Reflections on Reservations to

controversy, a request was submitted by the UN General Assembly (UNGA) to the International Court of Justice (ICJ) on 17 November 1950 which asked the following:

> In so far as concerns the Convention on the Prevention and Punishment of the Crime of Genocide, in the event of a State ratifying or acceding to the Convention subject to a reservation made either on ratification or on accession, or on signature followed by ratification:
>
> I. Can the reserving State be regarded as being a party to Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?
>
> II. If the answer to question I is in the affirmative, what is the effect of the reservation as between the reserving State and:
>
> a. The parties which object to the reservation?
>
> b. Those which accept it?[6]

The opportunity availing itself to the ICJ was one of two-fold importance. Firstly, it was an opportunity to provide definitive guidance on the issue of reservations, an area that appears to have been of concern to some States out-with the context of the Genocide Convention.[7] The second issue concerned the protection of human rights, namely the prevention and punishment of

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General Multilateral Treaties' (1993) 64 British Ybk Intl L 245, 248; GG Fitzmaurice, 'Reservations to Multilateral Conventions' (1953) 2 ICLQ 1, 2.

[6] T Lie, 'Secretary-General of the UN to the President of the ICJ, Request for Advisory Opinion' (Leg. 46/03 (6)) New York, 17 November 1950. Question III has been omitted as it is not relevant to the present discussion.

[7] See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, Pleadings, Oral Arguments, Documents, 28 May 1951, Written Statement by The Organization of American States (14 December 1950) 15 (OAS Statement to the ICJ).

genocide, and it is this concern, being fresh on the minds of States following the horrors of World War II, that seems to have diverted attention away from what could have been a defining moment for treaty law. Though the advisory opinion request clearly limited the scope of the request to reservations pertaining to the Genocide Convention—a law-making treaty with human rights as the subject matter—the Court's opinion ultimately served as the preamble to a lengthy discourse on reservations which continues today.

Historically, and certainly up until the 1951 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*[8] (*Genocide Opinion*) advisory opinion, the crux of reservation permissibility hinged on whether another State accepted or objected to a formulated reservation. A reservation can only be 'established' and therefore produce a legal effect if it has been accepted either expressly or by tacit consent. Following the request for the advisory opinion, the ICJ surveyed the existing practices of States with respect to reservations and observed principles that generally followed traditional contract law concepts. As an issue of first impression, the Court welcomed comment by interested parties[9] on their reservations practice; the primary approaches among which are distilled below. It must be underlined that the ICJ request for information on State practice on the question of reservations was not limited to reservations to the Genocide Convention but sought information on States' views on reservations in general.

*A. Unanimity*

[8] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15 (*Genocide Opinion*), 29.

[9] Written statements were received by the Organization of American States, USSR, Jordan, United States of America, United Kingdom, Israel, the International Labour Organization, Poland, Czechoslovakia, the Netherlands, Romania, Ukraine, Bulgaria, Byelorussia and the Philippines and the Court heard oral Statements from the United Kingdom, France and Israel. *Genocide Opinion*, Pleadings, Oral Arguments, Documents, Minutes of the Sittings held 10-14 May 1951 and 28 May 1951, 301.

Until the *Genocide Opinion*, three schools of thought on reservation acceptance had prevailed: unanimity, absolute State sovereignty and the compromise approach. In brief, unanimity was a strict rule whereby a State depositing a ratification instrument with a proposed reservation would not become a State Party to a convention if any single previously ratifying State objected to the reservation and was the practice then exercised by the UN Secretary-General.[10] At the time, this rule was believed by many to be a universally recognised principle of international law.[11] However, according to some States, the unanimity practice 'extended the veto' into the UN system because a single State could prevent another State from becoming a party to a multilateral treaty even where all other State Parties to the same agreement accepted the reservation.[12] The unanimity rule paid deference to the 'law-making' character of treaties because the agreements embodied the rules of law adopted by States which were to be enforced by the governments of each.[13]

*B. Absolute sovereignty*

The second approach to reservations was the absolute sovereignty principle which asserted that making reservations was a sovereign act of the State, a right which was absolute and necessary to exercising sovereignty. The long-standing and fundamental principle of State consent being necessary before treaty obligations could be imposed underpins this approach but is clearly challenged by invalid reservations which, by definition, are not allowed. This position was primarily advocated by the USSR[14] and some members of the Slav language group of States.[15]

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[10] For a brief summary of the UN Secretary-General's practice prior to 1952 see UN Treaty Section (n 5) paras 168-72.
[11] H Lauterpacht, 'Some Possible Solutions of the Problem of Reservations to Treaties' (1953) 39 Transactions of the Grotius Society 97, 97.
[12] OAS Statement to the ICJ (n 7) 19, referencing a memorandum from Uruguay to the Sixth Committee of the UNGA.
[13] 'Note: The Effect of Objections to Treaty Reservations' (1951) 60 Yale LJ 728, 731.
[14] Fitzmaurice (n 5) 10-11, fn 20, citing Report of the Secretary-General, UN doc A/1372, para 20.

In support of this extreme view of sovereign power exercise it was asserted that because conventions were the written expression of the will of the majority due to majority voting being the accepted practice for treaty adoption, reservations were the only method by which minority views could achieve fruition. If the minority States were not allowed reservations then they were forced to choose to subscribe to a convention expressing the will of the majority or to not become a party at all.

*C. Compromise approach*

A number of the written statements submitted to the ICJ demonstrated a third reservation practice by States which sought to strike a balance between strictly maintaining treaty integrity and adherence to the long-standing traditions of State sovereignty. Drawing upon the experience of concluding over 100 multilateral treaties within the Pan-American Union, the Organization of American States (OAS) explained the difficult situation in which the reservations question sat because it was a matter of drawing a line between two extremes. On the one hand was the adoption of a strict rule prohibiting all reservations except those with unanimous consent and on the other was to admit reservations without any limitation, a practice that would effectively render futile the practice of subscribing to conventions.[16]

The OAS had adopted a practice whereby reserving States would first circulate reservations to existing State Parties and obtain comment on proposed reservations prior to submitting an instrument of ratification or adherence. This closely tracked contract law and encouraged States proposing an unpopular reservation to revise or reconsider the reservation in order to conform to the popular will of the other parties. Thus the Pan-American approach

[15] *Genocide Opinion* (n 8) Oral Arguments, Documents, Written Statement by the United Kingdom (January 1951), Pleadings, 53 (UK Statement to the ICJ); Y Liang, 'The Third Session of the International Law Commission: Review of Its Work by the General Assembly' (1952) 46 AJIL 483, 492, citing UNGA, 6th Sess., Official Records of the Sixth Committee, 273rd meeting, paras 34 and 36.

[16] OAS Statement to the ICJ (n 7) 15.

encouraged a high ratification rate while assuming that 'reservations may frequently be technical qualifications of a treaty rather than substantial limitations of its obligations'.[17] It also was touted as the best rule to accommodate 'the use of treaties both for purposes of a contractual character and for the development of general principles of international law'.[18] The OAS was adamant that there were certain State policies of such importance that even the promise of promoting the development of international law or common political and economic interests was not a strong enough incentive for them to abandon these very individual national policies even if the price was the inability to join a multilateral convention.

*D. The Genocide Opinion*

Recognising the rarity of objections to reservations in practice at the time,[19] the ICJ surmised that none of the submitted views on reservations could provide definitive proof of an international customary rule. In fact, the views generally tended to represent administrative practices rather than legal interpretations. The Court noted that when the UN Sixth Committee debated reservations to multilateral conventions there was also a 'profound divergence of views' ranging from absolute integrity of a treaty to an extremely flexible approach which would maximize participation.[20] A flexible approach was favoured to address the precise questions asked regarding the Genocide Convention,[21] a treaty that was both normative and humanitarian and unlike any that had come before it. Because no settled practice could be extracted from the

[17] ibid 18.
[18] ibid 20.
[19] *Genocide Opinion* (n 8) 25.
[20] ibid 26; For a historical summary of the debate about integrity versus universality see Redgwell (n 5) 246-9; Fitzmaurice (n 5) 8.
[21] R Higgins, 'Introduction' in JP Gardner (ed), *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions* (BIICL 1997) xix.

various debates and views examined, the Court, by a slim majority,[22] chose to forge a new principle of law. Reservations would be subject to the objections of other State Parties but an objection would not necessarily defeat the reserving State's treaty party status. This departed from the unanimity rule and reflected the compromise approach. Therefore, in the particular case of the Genocide Convention,

> …a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention.[23]

The introduction of the 'object and purpose' test was the ground-breaking aspect of the *Genocide Opinion*. The test created a system of tiered rights which had previously not existed by allowing States to choose among the rights enumerated by the treaty and only prohibited those reservations that violated the object and purpose of the treaty.

In light of the assumption that a State should generally aim to preserve the essential object of the treaty,[24] the Court presumed a reserving State would not intentionally make a reservation that was incompatible with the object and purpose test and if it did then it would be assumed that the State failed to recognize the incompatibility. Otherwise, as noted by the Court,

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[22] The majority opinion was supported by Judges Basdevant, Winiarski, Zoričić, de Visscher, Klaestad, Badawi and Pasha. There were dissenting opinions by Judges Guerrero, McNair, Read, Mo and Alvarez. Alvarez filed a separate dissenting opinion.
[23] *Genocide Opinion* (n 8) 29.
[24] *Genocide Opinion* (n 8) 27.

the 'Convention itself would be impaired'.[25] The Court reiterated that the reservations practice it advanced was limited to conventions with a humanitarian subject-matter and that States could exercise their sovereign rights as long as the object and purpose of the convention was not contravened.

## III. PRACTICE IN RESPONSE TO INVALID RESERVATIONS

Ultimately, Vienna Convention Article 19(c) codified the object and purpose test as the default rule for determining the permissibility of a reservation for all treaties, not only those with a humanitarian or civilizing purpose.[26] Furthermore, the role of making such a determination was seemingly vested in the State Parties. Out-with an objection based on incompatibility with the object and purpose of the treaty, States are at liberty to object to a reservation on any basis or no basis at all—the political feature of the reservations regime.[27] To provide an element of closure on the issue of permissibility, Vienna Convention Article 20(5) places a time limit of 12 months on State objections. If no objection to a reservation is received within the time limit, the reservation is deemed accepted by the non-objecting State—the tacit acceptance rule. In response to the rules governing reservations, three doctrines have developed over the years to address the consequence resulting when a State makes a reservation that is met with an objection: permissibility, opposability and severability.

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[25] ibid.

[26] Vienna Convention (n 1) Article 19: A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

[27] A Aust, *Modern Treaty Law and Practice* (2nd edn, CUP 2007) 133-4; O Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 Yale L J 1935, 1952; MG Schmidt 'Reservations to United Nations Human Rights Treaties–The Case of the Two Covenants' in J P Gardner (ed), (n 21) 21; S Marks, 'Three Regional Human Rights Treaties and Their Experience of Reservations' in J.P. Gardner (ed) (n 21) 35-63, 61; JK Koh, 'Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision' (1982-83) 23 Harvard Intl L J 71, 73.

In keeping with the vocabulary preferred by the ILC, references to permissibility encompass evaluations of a reservation under Article 19 of the Vienna Convention, and include those specifically examined for compatibility using the object and purpose test set forth in Article 19(c).[28] Validity is the term adopted by the ILC to:

> …describe the intellectual operation consisting in determining whether a unilateral Statement made by a State … and purporting to exclude or modify the legal effect of certain provisions of the treaty in their application to that State … was capable of producing the effects attached in principle to the formulation of a reservation.[29]

Therefore, a reservation must be permissible to be valid.

*A. Permissibility*

The permissibility doctrine argues that a reservation incompatible with the object and purpose test is invalid and without legal effect, and therefore a nullity, regardless of whether other States object. This view stems from the natural reading of Vienna Convention Article 19(c) and suggests that incompatible reservations are void *ab initio* or are not proper reservations.[30] However, the issue is not as clear-cut as the permissibility doctrine makes it seem.

Recalling the general wording of reservations articles found in several of the UN core human rights treaties that 'a reservation incompatible with the object and purpose of the

[28] See ILC 'Guide to Practice on Reservations to Treaties, with commentaries as provisionally adopted by the ILC at its 62nd session' (2010) UN doc A/65/10 (Draft Guide to Practice), 3.1.3 and accompanying commentary. Furthermore, findings of impermissibility are solely the realm of law of treaties and do not engage international State responsibility, concerns over which sparked much debate during the eighteen year study on reservations to treaties by the ILC. Guide to Practice (n 2) 3.3.2. See also the ILC Yearbook 2002 (2002) UN doc A/57/10, 114, para 7; ILC, 'Tenth report on reservations' (2005) UN doc A/CN.4/558, Add.1 and Add.2, paras. 1-9; Draft Guide to Practice (n 28) 1.6, commentary, para 2 and 2.1.8, commentary, para 7.

[29] ILC, 'Report of the International Law Commission on the Work of its 58th session' (1 May - 9 June and 3 July - 11 August 2006) UN doc A/61/10, 324, para (2) of the general introduction to Part 3 of the draft guidelines.

[30] Swaine (n 5) 315; DW Bowett, 'Reservations to Non-Restricted Multilateral Treaties' (1976-77) 48 British Ybk Intl L 67, 84.

convention shall not be permitted' is seems natural that a reservation not compatible with the convention will not alter a State's obligations. If the reservation does not survive the object and purpose test then the reservation should not be up for debate. The nullity is established regardless of objections or acceptances by other State Parties and will have no bearing on the status of the reserving State as a party to the treaty. However, this neglects the fact that incompatibility is one of the primary reasons given when States object to reservations to human rights treaties, thus intimating that some assessment must be made. This is problematic as reservation practice has demonstrated that not all States agree on the invalidity of reservations.

Austria illustrated its preference for the permissibility approach in its 1994 objection to the reservation to Convention on the Elimination of all forms of Discrimination against Women[31] (CEDAW) made by the Maldives:

> The reservation made by the Maldives is incompatible with the object and purpose of the Convention and is therefore inadmissible under article 19 (c) of the Vienna Convention on the Law of Treaties and shall not be permitted, in accordance with article 28 (2) of the [CEDAW]. Austria therefore States that this reservation cannot alter or modify in any respect the obligations arising from the Convention for any State Party thereto.[32]

The objection employs the language of permissibility and leaves no doubt as to the consequence anticipated in relations between the two parties from Austria's point of view. Pursuant to the permissibility approach, however, this objection is unnecessary. A similar objection asserting the

[31] (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).
[32] UN Treaty Collection, 'Objections to CEDAW' <http://treaties.un.org>, Status of Treaties (UN Treaty Collection).

permissibility doctrine was lodged by Portugal in 1994 also in response to the reservations by the Maldives.[33]

Another notable point is that under the permissibility doctrine the 12-month rule that facilitates tacit acceptance of reservations should have no effect if a reservation is deemed impermissible.[34] States should not be able to accept impermissible reservations vis-à-vis other States yet tacit acceptance brings about precisely this result.[35] The coupling of the 12-month rule with the arbitrariness of the permissibility doctrine is a key practice that has added to the reservations quagmire. Members of the ILC acknowledge that while the permissibility approach is probably theoretically correct, it is the opposability approach that more accurately describes State practice,[36] though not necessarily in the context of human rights treaties.

*B. Opposability*

The opposability doctrine in traditional treaty law proposes that if a reservation is objected to by another State Party to an agreement then the reserving State will not be considered a party to treaty. Even in the face of a single objection, the pure opposability doctrine implies that the reserving State would not become a party to the convention reflecting the unanimity rule discussed in section two. The key difference from the permissibility approach is that the objection is the trigger for defining the status of the reserving State. The practice of States, however, has presented a different outcome and the result is not contingent on reservation validity as seen with the permissibility approach. Opposability instead governs State-to-State treaty relations in that no treaty relations are established between a reserving State and objecting

[33] ibid.
[34] Swaine (n 5) 317.
[35] C Redgwell, 'Reservations and General Comment No. 24(52)' (1997) 46 ICLQ 390 , 405; see generally Bowett (n 30).
[36] ILC, 'Report of the International Law Commission on the work of its 47th session' UN doc A/50/10 (1995), para 457.

State but this relationship has no bearing on other non-objecting State Parties. Thus, the situation would seem to present one set of States, those who do not object to a reservation, with whom the reserving State will be considered as being a treaty party and another set of States, those who object to the same reservation either based on invalidity or another reason, for whom the reserving State will not be a party to the treaty. This reflects the compromise approach followed by the OAS as discussed in section two. It is notable that the opposability doctrine was specifically not adopted at the Vienna Conference on the Law of Treaties as evidenced by Vienna Convention Article 20(4)(b). Article 20(4)(b) indicates that an objection will not prevent the entry into force of the treaty between the reserving State and objecting State unless 'a contrary intention is definitely expressed by the objecting State.'

Due to the nature of human rights treaties there appears no pressing need among State Parties to determine that the author State of an objected-to reservation be considered a non-State Party.[37] The 'super-maximum' effect is rarely invoked and, most often, objecting States specifically articulate that the objection will not inhibit the entry into force of the treaty between the two States,[38] thus specifically discarding the opposability approach. Only rarely does any State articulate its adherence to the traditional opposability doctrine. As demonstrated in its reservation to Convention on the Elimination of all forms of Racial Discrimination[39] (CERD), Fiji purports to follow the opposability doctrine: 'In addition it interprets article 20 and the other related provisions of Part III of the Convention as meaning that if a reservation is not accepted the State making the reservation does not become a Party to the Convention.'[40] Fiji may take this

[37] Though this was clearly a consideration of the UN Secretary-General and one of the reasons for referring the question regarding reservations to the Genocide Convention to the ICJ.
[38] Including a sentence that the objection will not prevent entry into force of the treaty between the reserving and objecting State is technically unnecessary due to the automatic presumption established by Vienna Convention, Art. 21(3).
[39] (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 (CERD).
[40] UN Treaty Collection (n 32) Fiji, Reservations to CERD.

position but no States have publicized whether or not they agree with this interpretation of CERD. Another example of a State invoking traditional opposability comes from Sweden. Its objections made to numerous States' reservations to CEDAW specified that the reservations to which it objected 'constitute an obstacle to the entry into force of the Convention between Sweden and [the Maldives, Kuwait, Lebanon and Niger]'.[41] Followers of the opposability approach maintain that the Vienna Convention invests non-reserving States with the determinative function of assessing compatibility of reservations.[42]

The lack of objections to invalid reservations utilising the opposability doctrine results in the unintended and illogical consequence that the reserving State always becomes a party to the treaty despite the unacceptable reservation. If there is no objection, as a result of the reserving State becoming a State Party the invalid reservation ultimately becomes acceptable via the doctrine of tacit acceptance set forth in Vienna Convention Article 20(5). Considering the unilateral actions of ratification and reservation formulation relating to human rights treaties and the fact that these actions are entirely independent of other State Parties in light of the non-reciprocal nature of such treaties, 'it makes little sense then to suggest that the reservation may be opposable'.[43] This view of the non-applicability of the opposability doctrine is supported by the Inter-American Court of Human Rights *Effect of Reservations on the Entry into Force of the ACHR*[44] advisory opinion.

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[41] ibid Objections to Reservations to CEDAW, objections by Sweden made in 1994, 1996, 1998 and 2000, respectively.
[42] See Swaine (n 5) 315; JM Ruda, 'Reservations to Treaties' (1975-III) 146 Recueil des cours 95, 101.
[43] M Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law' (2000) 11 EJIL 489, 508.
[44] *Effect of Reservations on the Entry Into Force of the American Convention on Human Rights*, Advisory Opinion OC-2/82, Inter-American Court of Human Rights Series A No 2 (24 September 1982), para 29.

The opposability approach does not resolve the problem of invalid reservations and, as noted by Craven, it 'has little salience in the context of human rights treaties',[45] especially in light of the goal of achieving universal ratification. The application of the opposability doctrine is indecisive and fails to give serious consideration to the issue of invalidity since the practice produces the same result no matter what the basis of the objection.[46] The legal effect of an invalid reservation is not definitively cured by this doctrine, especially when applied in response to non-reciprocal treaties, such as human rights treaties.

*C. Severability*

Severability proposes that if an impermissible reservation is formulated then the author State will be bound to the treaty without the benefit of the reservation. It is a principle that speaks to the legal consequence of an impermissible reservation. The concept of a State being bound 'without the benefit' of its invalid reservations is a natural extension of the permissibility doctrine in light of the fact that States authoring invalid reservations have generally continued to operate as if the concept of permissibility does not exist because opposing States rarely outline the consequence of the invalid reservation. The principle is not a direct opposition to opposability; it has instead grown out of the reality that parties to multilateral treaties are less inclined to insist on the super-maximum effect that the classic opposability doctrine mandates if observed in the strictest sense--the State authoring the invalid reservation would fail to become party to the treaty.

The severability principle cannot be found in the Vienna Convention nor is it currently supported in customary international law. Rather, it was developed through court and treaty body jurisprudence related to human rights treaties, particularly in the late 1980s and early 1990s, and in reviewing the objections to reservations to the core UN human rights treaties it appears that

[45] Craven (n 43) 497.
[46] Under the opposability doctrine, objections to invalid reservations generate the same effect as objections to validly formulated reservations. See Swaine (n 5) 315.

the doctrine has gained a slow, but steady acceptance. The obvious advantage to this approach is that the State will remain bound to the treaty.[47]

Though case law on the subject of reservations is scant, the European Court of Human Rights (ECtHR) outlined the principle of severability in the 1988 *Belilos v Switzerland*[48] case. Opting to follow the severability principle in lieu of the opposability doctrine, the Court found that Switzerland was bound to the European Convention on Human Rights[49] (ECHR) despite having made an invalid reservation. The Court succinctly stated that if a reservation was determined invalid then it was without effect and would be severable with the result that the obligation against which the invalid reservation was directed would still be in effect in its entirety for the reserving State.[50] In this instance, the Court determined that the reservation[51] in question (to ECHR Article 6(1)) was invalid and severable because it was not only of a general nature, contrary to ECHR Article 57(1), but also because there was no 'brief statement of the law concerned' as required by ECHR Article 57(2).[52] Despite Switzerland's contention that the ECHR State Parties had accepted the declaration/reservation by virtue of their silence the Court pointedly clarified that '[t]he silence of the depositary and the Contracting States does not deprive the Convention institutions of the power to make their own assessment.'[53]

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[47] Redgwell (n 35) 407.
[48] *Belilos v Switzerland* [1988] 10 EHRR 466.
[49] as amended by Protocol Nos. 11 (ETS No. 155) and 14 (CETS No. 194) (adopted 4 November 1950, entered into force 1 June 2010) ETS No. 005, 213 UNTS 221.
[50] *Belilos* (n 48) para 60. For a discussion, see generally, HJ Bourguignon, 'The Belilos Case: New Light on Reservations to Multilateral Treaties' (1988-89) 29 Virginia J Intl L 347; RSJ Macdonald, 'Reservations under the European Convention on Human Rights' (1988) Revue belge de droit international 429.
[51] The reservation was actually titled a declaration however as applied it created a reservation. See S Marks, 'Reservations Unhinged: The *Belil*os Case Before the European Court of Human Rights' (1990) 39 ICLQ 300; I Cameron and F Horn, 'Reservations to the European Convention on Human Rights: The Belilos Case' (1990) 33 German Ybk Intl L 69. For an analysis of the distinctions, see DM McRae, 'The Legal Effect of Interpretative Declarations' (1978) 49 British Ybk Intl L 155.
[52] The Court referred to then Art. 64 as was in force in 1988. See Bourguignon (n 50) 362 et seq.
[53] *Belilos* (n 48) para 47.

The case was, in fact, the first time an international tribunal had determined a reservation to be invalid.[54] The contradictory approaches by the other State Parties and the Court reflect the unsettled approach to invalid reservations in practice. It may also indicate that States generally were not in the business of assessing the reservations of other State Parties. Marks notes that in *Belilos* the ECtHR had four options once it determined that the Swiss reservation was invalid: firstly, the invalidity would have no effect; secondly, the invalid reservation would cause the applicable article (ECHR Article 6) to be inapplicable to Switzerland; thirdly, the invalid reservation would be ignored (severed) with Article 6 remaining applicable to Switzerland; or, finally, the Swiss ratification would be treated as a whole invalid resulting in Switzerland no longer being considered a party to the ECHR.[55] Choosing the third option, the Court gambled that membership to the ECHR was more important to Switzerland than the exclusion of the provision against which it had reserved and thus severed the reservation from its ratification.[56] Counsel for Switzerland had actually admitted the prevailing importance of ECHR membership during the hearing,[57] which arguably made the Court's decision easier. Switzerland subsequently redrafted and resubmitted an amended reservation to the same article.[58]

The severance principle was confirmed by two subsequent European cases. In *Weber v Switzerland*[59] the Court examined the revised Swiss reservation to Article 6(1) and found that due to the failure of the Swiss government to append 'a brief statement of the law concerned' as required by then-Article 64(2), the reservation was invalid.[60] Recalling its *Belilos* judgment, the

[54] Bourguignon (n 50) 380.
[55] Marks (n 27) 48-9.
[56] *Belilos* (n 48) para 60.
[57] Schabas (n 5) 73.
[58] This exercise in reformulation of a reservation introduced a novel approach to rectifying impermissible reservations as will be discussed in section five.
[59] *Weber v Switzerland* European Court of Human Rights Series A No 177 (22 May 1990).
[60] ibid paras 37, 38.

Court severed the reservation and applied the ordinary meaning of Article 6.[61] *Loizidou v Turkey*[62] further cemented the Strasbourg approach[63] when the ECtHR noted the special character of the ECHR and stated that the Convention regime 'militates in favour of severance'.[64] It further opined that Turkey's 'impugned restrictions [could] be severed from the instruments of acceptance…leaving intact the acceptance of the optional clauses'.[65] These 1990 and 1995, respectively, decisions put all ECHR State Parties on notice that a reservation, or any statement amounting to a reservation, must comply with the structural requirements for reservations as set forth in the Convention.

The ECtHR's approach to severing an invalid reservation and leaving the reserving State bound to the reserved article is different from the Vienna Convention approach to invalid reservations. Under the Vienna Convention approach States determine validity amongst themselves, thus the invalid reservation may be applicable between the reserving State and accepting States while simultaneously being inapplicable between the reserving State and an objecting State. In the second scenario, the entirety of the article that is the object of the reservation will not be in effect as between the reserving and objecting States. This, however, proves an irrelevant point between the States in the context of non-reciprocal treaties where the obligations are owed to third parties and no rights are modified *inter se*.

The *Belilos* decision signified a crucial moment in the reservations debate as it departed from the State-centric view of States as the sole arbiters of validity and contravened the long-held principle of absolute State sovereignty in determining treaty obligations. Furthermore,

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[61] ibid para 38.
[62] *Loizidou v Turkey*, Preliminary Objections, European Court of Human Rights Series A No 310 (23 March 1995); [1995] 20 EHRR 99.
[63] Severability is often referred to as the 'Strasbourg approach' as a result of the Court's stance on continued applicability of reserved articles of the ECHR when a reservation to the article is deemed invalid.
[64] *Loizidou* (n 62) para 96.
[65] ibid para 97.

despite the recognition in both customary international law and the Vienna Convention of a State's role in assessing a reservation either by acceptance of or objection to, the *Belilos* Court also excluded consideration of other Contracting Parties' reactions, or lack thereof, when as a convention organ it evaluated the validity of a reservation.[66] With these decisions the ECtHR has been effective in bolstering the idea that when a supervisory organ is created specifically to oversee a convention, States are relieved of absolute control over reservation compatibility.

Lending support to Strasbourg, the Inter-American Court of Human Rights (IACtHR) outlines a reservation's compatibility with the object and purpose test of the Vienna Convention, not the acceptance of the reservation by another State Party, as the key to evaluating reservations. The distinction between using the State to evaluate a reservation and the outlined adjudicatory and advisory mechanisms established by the American Convention on Human Rights[67] (ACHR) is important as explained in the Court's dicta in the *Restrictions on the Death Penalty* advisory opinion which suggests that the Convention supervisory organs, not the States, have the final say on the compatibility of reservations.[68] For purposes of this particular advisory opinion, the Court indicated that a reservation, even without an evaluation of compatibility, would not preclude the entry into force of a treaty for a State whose instrument of ratification was accompanied by a reservation. This supports the severability principle as the IACtHR did not contemplate that a later determination of incompatibility would invalidate the State's consent to be bound.

The severability principle was affirmed in the Inter-American system in the 2001 *Hilaire* case despite Trinidad and Tobago's argument that if its reservation to the Court's jurisdiction

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[66] *Belilos* (n 48) para 47: 'The silence of the depositary and the Contracting States does not deprive the Convention institutions of the power to make their own assessment.'
[67] (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 144 (ACHR).
[68] *Restrictions on the Death Penalty* (Articles 4(2) and (4) of the American Convention on Human Rights), Advisory Opinion OC-3/83, Inter-American Court of Human Rights Series A No 3 (8 September 1983) paras 45 et seq.

was determined to be invalid then the State's declaration accepting the compulsory jurisdiction would be void *ab initio*.[69] The counter-argument highlighted that the reservation was excessively vague and made it impossible to determine its scope.[70] Further supporting the concept of severance, the Inter-American Commission on Human Rights (IACommHR) argued that if the State's consent was voided rather than simply severing the reservation then the rights of the applicant would not be guaranteed, which is the point of the ACHR.[71] The IACtHR ultimately agreed with the IACommHR and severed the reservation thereby holding Trinidad and Tobago bound to the ACHR without the benefit of the reservation which enabled them to proceed to an examination of the merits of the case.[72]

The Human Rights Committee (HRC)—the supervisory body to the International Covenant on Civil and Political Rights[73] (ICCPR)—further ensconced the severability principle in the controversial *General Comment No. 24* confirming the position that an invalid 'reservation [to the ICCPR] will generally be severable, in the sense that the Covenant will be operative for the reserving party without the benefit of the reservation'.[74] *General Comment No. 24* was formulated in specific response to the great number of reservations that were attached to the ICCPR, which was, at the time, 150 reservations of varying significance made among 46 of the

[69] *Hilaire v Trinidad and Tobago* (Preliminary Objections) Inter-American Court of Human Rights Series C No 80 (1 September 2001) para 49.
[70] ibid para 53.
[71] ibid para 67.
[72] The Inter-American Court came to the same conclusion on invalidity of Trinidad and Tobago's reservation to the compulsory jurisdiction clause of the Court in a series of cases: *Benjamin et al. v Trinidad and Tobago* (Preliminary Objections) Inter-American Court of Human Rights Series C No 81 (1 September 2001); *Constantine et al. v Trinidad and Tobago* (Preliminary Objections) Inter-American Court of Human Rights Series C No 82 (1 September 2001).
[73] (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[74] UN Human Rights Committee (HRC), 'General Comment No 24(52): Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant' (2 November 1994) UN doc CCPR/C/21/Rev.1/Add.6, para 18, reprinted in UNCHR 'Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) UN doc HRI/GEN/1/Rev.9 (Vol. I), 210 (General Comment No 24).

then 127 State Parties.[75] Initially addressing the types of reservations threatening the coherence of the treaty regime, the HRC indicated that reservations offending peremptory norms or customary international law were not compatible with the object and purpose of the ICCPR and it provided a laundry list of ICCPR protections against which no reservation could be deemed valid.[76] Specifically invoking principles of general international law and particularly the Vienna Convention, the HRC then outlined that the traditional reciprocal nature of treaties was not present in human rights treaties and therefore 'the role of State objections in relation to reservations is inappropriate to address the problem of reservations to human rights treaties'.[77]

*1. Severability and its discontents*

The primary difficulty with the concept of severability is that is contradicts the long-held principle in international law that a State may not be bound to a treaty any further than that to which it has consented.[78] Obviously, holding a State bound to a treaty obligation against which it has formulated a reservation contravenes this principle. Not surprisingly, the severability principle has been refuted by many governments, particularly the US, UK and France, as a violation of the fundamental principle of international law which conditions an international obligation on consent.[79] This is reflected in their most recent objections to invalid reservations in that generally none of these States indicate that the reserving State will be bound without the benefit of its reservation.

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[75] ibid para 1.
[76] ibid para 8.
[77] ibid. para 17; an opinion echoed by many, see I Boerefijn, 'Impact on the Law on Treaty Reservations' in MT Kamminga and M Scheinin (eds), *The Impact of Human Rights Law on General International Law* (OUP 2009) 85; EA Baylis, 'General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties' (1999) 17 Berkeley J Intl Law 277.
[78] *Genocide Opinion* (n 8) 21.
[79] 'Observations by the Governments of the United States and the United Kingdom on Human Rights Committee General Comment No. 24 (52) relating to reservations' (1995) UN doc A/50/40; see also K Korkelia, 'New Challenges to the Regime of Reservations under the International Covenant on Civil and Political Rights' (2002) 13 EJIL 437, 462 et seq.; R Baratta, 'Should Invalid Reservations to Human Rights Treaties Be Disregarded?' (2000) 11 EJIL 413, 417; Baylis (n 77) 318-22.

Where a State's consent to be bound is tied to the acceptance of its reservations it seems questionable whether another State Party may negate a reservation, even if it is invalid. For those States whose consent to be bound is facilitated through their domestic legislature and contingent upon the acceptance of reservations attached to instruments of ratification, the current system offers no governing principles on how to treat reservations that are invalid but integrally tied to consent to be bound. This lacuna is both a practical roadblock to interpretation in the event of a violation and detrimental to determining overall compliance with treaty obligations. States such as the US and the UK will often condition their consent to be bound to treaties upon ratification subject to the reservations as contemplated by their respective legislative branches of government. Under the severability principle the State becomes a party without the benefit of an invalid reservation yet this expressly ignores the conditional consent to be bound. It seems that States are cognizant of such conditional consent and are willing to maintain objections without specifying severance.

Consider the reservations to ICCPR made by the US which indicate that ratification of the treaty is expressly subject to acceptance of the reservations attached to the instrument of ratification.[80] In 1993 Sweden objected to six of the reservations made by the US indicating that 'reservations made by the United States of America include both reservations to essential and non-derogable provisions, and general references to domestic legislation' and therefore are

[80] Three of the reservations read as follows*:* (1) That Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States. (2) That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age. (3) That the United States considers itself bound by Article 7 to the extent that `cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

contrary to the treaty.[81] The US reservations have not been removed and Sweden included in its statement that the objection did not preclude entry into force between the two countries. Sweden did not specifically outline that the US would not benefit from the reservations, as it did when objecting to reservations by a multitude of States to CEDAW. Where does this leave the status of the reservations made by the US? Under the current regime there is no straightforward answer.

It has been suggested that severance is 'conceptually closer' to the regime set-out by the ICJ in the *Genocide Opinion*.[82] However, there is no clear regime to follow. Schabas points out that there is an ambiguity to the severability principle in that it does not clearly indicate, at least as evidenced by States' objections, that the reserved provision will actually be enforced as part and parcel of the treaty.[83] The exception would be those objections indicating that the treaty in its entirety will be in effect 'without the benefit' of the offending reservation which is the phrasing used most often in the years subsequent to Schabas's observation. Without specifying that the invalidly reserved provision is to be enforced, severability would actually give full effect to the reservation.[84] States appear to have noted this incongruous approach and remedied it to the extent possible in their objection formulation.

Responding to the early uptake of the severance approach, Bradley and Goldsmith argue that it is incorrect to conclude that a State continues to be bound by articles to which it has made reservations even if the reservations are deemed by some States to violate the object and purpose test.[85] Their position basically asserts, for example, that if the offending US reservations are

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[81] UN Treaty Collection (n 32) Objections to Reservations to the ICCPR, Declaration by the Government of Sweden with respect to reservations made by the United States of America (18 June 1993) to ICCPR. Many others States, including Belgium, Denmark, Finland, France, Germany, Italy, Netherlands, Norway, Portugal and Spain also objected.
[82] Redgwell (n 35) 410.
[83] Schabas (n 5) 72.
[84] Macdonald (n 50) 449.
[85] CA Bradley and JL Goldsmith, 'Treaties, Human Rights, and Conditional Consent' (2000) 149 University of Pennsylvania Law Review 399, 436.

actually treated as severed in an adversarial procedure, the literal application of the US position, pursuant to its ratification and reservation is that consent to treaty membership would be nullified, thus mooting any cause of action brought under the treaty. This position maintains a stronghold in the US. Goodman and Macdonald alternatively argue that completely invalidating the consent to be bound to a treaty gives disproportionate weight to the invalid reservation and invalidating the entire obligation that was subjected to the reservation is not appropriate when the obligations are non-reciprocal.[86] If severing the invalid reservation negates the consent to be bound to the treaty thus rendering the State no longer bound to the treaty in any way or, less drastically, negates the obligation that was the subject of the invalid reservation, effectively erasing it from the catalogue of obligations owed. The value of State-policing of reservations is then lost as the reserving State ultimately has no obligation with respect to the article reserved against precisely as it originally intended.

*D. State Adherence to the Severability Principle*

Despite early resistance, some States have indicated an increasing preference for severance as the consequence for invalid reservations. The trend of States purporting to sever reservations is traceable primarily across humanitarian and human rights conventions adopted post-World War II. For example, though now opposed to the principle, the UK demonstrated a penchant for severing invalid reservations in the late 1970s and early 1980s when it objected to the reservations of several States to the 1949 Geneva Conventions. In its ratification to the Geneva Conventions the UK declared that it held certain reservations to be invalid and therefore 'regard[ed] any application of any of those reservations as constituting a breach of the Convention to which the reservation relates' while also regarding the reserving States as parties

[86] R Goodman, 'Human Rights Treaties, Invalid Reservations, and State Consent' (2002) 96 AJIL 531; Macdonald (n 50) 449.

to the Geneva Conventions.[87] The UK reiterated this position when objecting to subsequent reservations made to the Geneva Convention on the Treatment of Prisoners of War[88] by the Republic of South Vietnam and Guinea-Bissau[89] in 1976 and to reservations made by Angola[90] in 1985.[91]

Indeed, the 1970s and 1980s witnessed minor references to severability though the practice and language asserting the principle varied greatly among States and treaties. New Zealand and the Netherlands, for example, both asserted severance in principle in response to reservations made to the 1961 Vienna Convention on Diplomatic Relations[92] by Bulgaria, Byelorussia, Mongolia and the Ukraine, among others.[93] Following a statement that a reservation was 'not acceptable', the phraseology used by the Netherlands generally indicated 'that this provision remains in force in relations between it and the said States in accordance with international customary law.'[94] New Zealand followed a similar pattern and in response to invalid reservations indicated it 'considers that those paragraphs are in force between New Zealand and [the reserving State]'.[95] Other States acknowledged the same reservations as 'illegal'[96] or as not being valid[97] without specifying a consequence.

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[87] UK ratification of the 1949 Geneva Conventions, 75 UNTS 973 (1949), ratification at 278 UNTS 259 (1957) 266-8.
[88] (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135.
[89] See 1404 UNTS 337 (1985).
[90] See 995 UNTS 394 (1976) 394-7.
[91] See discussion by F Hampson, Sub-Commission on the Promotion and Protection of Human Rights, 'Specific Human Rights Issues, Reservations to Human Rights Treaties, Final working paper' (2004) UN doc E/CN.4/Sub.2/2004/42, paras 16-17.
[92] (adopted 18 April 1961, entered into force 24 April 1964 ) 500 UNTS 95.
[93] ibid. The Netherlands objected to reservations to Art 11(1) by Bulgaria, the German Democratic Republic, Mongolia, Ukraine; USSR, Byelorussia and Yemen; Art 27(3) by Bahrain and Qatar; and Art 37(2) by Egypt, Cambodia (then Khmer Republic, Malta, Morocco, Qatar, Yemen. It specified severance in all instances. New Zealand also specified severance in its objections to reservations to Art 11(1) by Bulgaria, Byelorussia, Mongolia, Ukraine and USSR and to Arts 37(2),(3) and (4) by China.
[94] ibid.
[95] ibid.
[96] ibid. USSR objection to reservation to Art 27(3) by Qatar.
[97] ibid, e.g. Objections by Hungary and Ireland to reservations to Art 37(2), (3), and (4) by China.

Admittedly, many treaties leave little space for reservations and instead utilise consensus law-making or the 'package approach' to gain wide agreement on obligations then delegate the minutia either to intergovernmental bodies or international organisations. For example, the UN Convention on the Law of the Sea,[98] was designed along this formula; however, it, too, has at least one assertion of severance by Australia in response to a reservation (titled a declaration) by the Philippines regarding its archipelagic waters. It objected stating:

> Australia cannot, therefore, accept that the statement of the Philippines has any legal effect…and considers that the provision of the Convention should be observed without being made subject to the restrictions asserted in the declaration…[99]

Without using the more contemporary formulation, Australia effectively indicated that the convention would be in effect for the Philippines without the unilateral assertions made in its declaration. Throughout the early 1990s other examples are sprinkled across the international system. The true emergence of severance as a defined consequence for an invalid reservation did not occur until several years after the HRC's *General Comment No. 24*.

*1. Practice specific to human rights treaties*

There has been marked evolution in many States' approaches to outlining the effect of invalid reservations over the past two decades, particularly in relation to human rights treaties. This evolution loosely tracks the overall change in attitude toward human rights and reflects a stronger view of the importance of these obligations. It is, however, unclear whether these States are more interested in sending a message to reserving States that they value the maintenance of a coherent treaty system or whether increasingly strong language merely satisfies a human rightist agenda without concern for treaty law. Either way, a review of States which frequently file

[98] (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.
[99] ibid, Objection by Australia, 3 August 1988.

objections reflects the progression toward more stringent approaches to outlining the legal effect of an invalid reservation, sometimes moving from permissibility to opposability to severance (Sweden, for example), other times simply jumping from permissibility to severability, as evidenced by Austria's 1994 objection to the reservations by Maldives to CEDAW (following the permissibility doctrine) contrasted against subsequent objections to reservations to CEDAW by Pakistan, Lebanon, North Korea, among others (opting for severance). The delay in adherence to the severability approach is not surprising as it reflects the reticence with which States accept the concept especially in light of the direct challenge to a reserving State's sovereignty.

Recalling Sweden's response to the US reservations to the ICCPR discussed in the previous section, it could be argued that the nuanced approach to the US reservations took into account the conditional consent factor. Contrasting the objections to the US with objections to reservations to CEDAW, Sweden specified that '[t]he Convention enters into force in its entirety between the two States, without Bahrain [and others] benefiting from its reservation'.[100] It is likely that the simple fact of timing in the development of the severability doctrine played a role.[101] Prior to 1994 Sweden generally only noted the incompatibility of reservations pursuant to the object and purpose test and underscored their undermining effect on international law without specifying any legal effect but in all cases noting that the reservations would not prevent the entry into force of the treaty between Sweden and the reserving State.[102] However, between 1994 and 2001 Sweden generally opted to follow the opposability doctrine, at least in relation to States making reservations to CEDAW. *General Comment No. 24* whereby the HRC indicated

[100] The same statement was made mutatis mutandis in response to reservations made by Saudia Arabia, North Korea, Mauritania, Syria, Micronesia, United Arab Emirates, Oman, Brunei Darussalam and Qatar.
[101] There is also a strong argument that political considerations play into the use of severance, and objections generally, but it is not a theme to be pursued in this article.
[102] See particularly its objections to reservations to CEDAW, UN Treaty Collection (n 32) Objections to Reservations to CEDAW.

that it would sever incompatible reservations was published in 1994 and possibly opened the eyes of States to the option. Interestingly, Sweden did not readily subscribe to the severability approach until 2001,[103] but has remained true to the principle.[104] Since 2001, Sweden has indicated severance of incompatible reservations to the ICCPR by Botswana, Turkey, Mauritania, Maldives and Pakistan and also in response to incompatible reservations made to CEDAW by Micronesia, United Arab Emirates, Syrian Arab Republic, Bahrain, Mauritania, among others.[105] The evolution of Swedish practice exemplifies the development of the doctrines of the legal effect of invalid reservations and the eventual recognition that a more concrete consequence, severance, must be attached to States' objections.

In analysing reservations to the ICCPR it is evident that Sweden is not alone in moving toward the severability approach. Objections to reservations to the ICCPR made by Denmark (to Botswana, 2001), Finland (to Maldives and Pakistan, among others), Greece (to Turkey, 2004), Latvia (to Mauritania, 2005; to Pakistan, 2011), Norway (to Botswana, 2001), Slovakia (to Pakistan, 2011), to identify a few,[106] indicate that States are gradually opting for a more clear indication of the consequence of invalidity in the form of severability. The same uptake of the principle can be seen in the patterns of States' objections to reservations to ICESCR,[107]

[103] The same can be said generally of the other Nordic States. See J Klabbers, 'Accepting the Unacceptable? A New Nordic Approach to Reservations to Multilateral Treaties' (2000) 69 Nordic Journal of International Law 179; L Magnusson, 'Elements of Nordic Practice 1997: The Nordic Countries in Co-ordination' (1998) Nordic Journal of International Law 350.

[104] Though Sweden did technically indicate severance of Kuwait's reservation to the ICCPR in 1997 albeit in a less clear formula than that subsequently used.

[105] See UN Treaty Collection (n 32) Objections to Reservations to the ICCPR and Objections to Reservations to CEDAW.

[106] Ibid, Objections to Reservations to the ICCPR.

[107] ibid, see objections to reservations to the ICESCR by Denmark (to Pakistan, 2005), Finland (to Bangladesh, 1999; Pakistan, 2005), Greece (to Turkey, 2004), Italy (to Kuwait, 1997), Latvia (to Pakistan, 2005), Netherlands (to Pakistan, 2005), Norway (to China, 2002; to Pakistan, 2005), Pakistan (to India, 2005), Slovakia (to Pakistan, 2009), and Sweden (to Bangladesh, 1999; to China, 2002; to Turkey, 2004; to Pakistan, 2005).

CEDAW,[108] CAT[109] and, to a lesser extent, in CERD.[110] This definitive shift on severability is a boon to the human rights system if the ultimate goal is global recognition of universal rights; whether recognition of the doctrine will gain momentum outside of the human rights regime remains to be seen.

## IV. GUIDE TO PRACTICE ON RESERVATIONS

Beginning in 1993 the ILC began a systematic study of the practice of making reservations to multilateral treaties including human rights treaties. The study culminated in the 2011 Guide to Practice on Reservations to Treaties[111] (Guide to Practice or Guide). Extensive attention was paid to the legal effect of invalid reservations and though human rights treaties threw up the most persistent problems in this context, the ILC ultimately drew up guidelines generally applicable to all types of treaties. In a bid to fill the consequences gap and with the support of the human rights treaty bodies,[112] the ILC put forth their most progressive guideline detailing the status of a State that has formulated an invalid reservation. Departing from previous views on regional human rights approaches to invalid reservations,[113] the Guide indicates that the reservation is null and void[114] even without an objection by another State Party[115] and will be severed:

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[108] ibid, the objections to reservations to CEDAW are numerous thus the following is only a small sample and does not include those States noted for advocating severance in their objections to reservations to the ICESCR (previous footnote): Austria (examples in text); Belgium (to Brunei Darussalam and Oman, 2007; to Qatar, 2010); Canada (to Brunei Darussalam, 2007), Czech Republic (to Oman and Brunei Darussalam, 2007; to Qatar, 2009), and Estonia (to Syria, 2004; to Qatar, 2010).

[109] Czech Republic (to Pakistan, 2011), Denmark (to Botswana, 2001), Finland (to Bangladesh, 1999; to Qatar, 2001; to Pakistan, 2011), Latvia (to Pakistan, 2011), Norway (to Qatar and Botswana, 2001; to Pakistan, 2011), Slovakia (to Pakistan, 2011), Sweden (to Qatar, 2000; to Botswana, 2001, to Thailand, 2008; to Pakistan, 2011).

[110] See specifically Sweden's objections.

[111] (n 2).

[112] UNCHR '2007 Report on Reservations' (2007) UN doc HRI/MC/2007/5 and Add.1, para 16(7).

[113] ILC, 'Report on the work of the 49th session' (12 May – 18 July 1997) UN doc A/52/10, para 84. In the report Pellet suggested that the Strasbourg approach was a form of regional customary law that did not otherwise impact customary law on reservations.

[114] Guide to Practice (n 2) 4.5.1.

[115] ibid 4.5.2.

4.5.3 Status of the author of an invalid reservation in relation to the treaty

1. The status of the author of an invalid reservation in relation to a treaty depends on the intention expressed by the reserving State or international organization on whether it intends to be bound by the treaty *without the benefit of the reservation* or whether it considers that it is not bound by the treaty.

2. Unless the author of the invalid reservation has expressed a contrary intention or such an intention is otherwise established, it is considered a contracting State or a contracting organization *without the benefit of the reservation*.

3. Notwithstanding paragraphs 1 and 2, the author of the invalid reservation may express at any time its intention not to be bound by the treaty *without the benefit of the reservation*.

4. If a treaty monitoring body expresses the view that a reservation is invalid and the reserving State or international organization intends not to be bound by the treaty *without the benefit of the reservation*, it should express its intention to that effect within a period of twelve months from the date at which the treaty monitoring body made its assessment.[116]

In essence, this guideline applies a rebuttable presumption that the author State formulating an invalid reservation will remain bound by the treaty without the benefit of the reservation unless the State expresses an alternative intention, to no longer be party to the treaty.[117]

Thus the guideline adheres to the principle of severability, without using the specific term save in the commentary, but allows room for movement in the instance that the author State's

[116] ibid 4.5.3, emphasis added.
[117] See Draft Guide to Practice (n 28) commentary to 4.5.2.

consent to be bound is tied to the acceptance of its reservation. This position pays great deference to the practice of regional human rights courts as well as the HRC[118] and marks a sharp departure from the ILC's views on severability early in the study. It also reflects the growing recognition of the principle by States. The Guide commentary also advocates the doctrine of 'divisibility' or 'severability' if a reservation is formulated in clear contravention of Articles 19(a) or 19(b),[119] thus it is not only incompatibility with the object and purpose test--impermissibility--that triggers severance but also other flaws in formulation rendering the reservation invalid.

While this step to cure the consequences lacuna perpetuated by the Vienna Convention is undoubtedly one in the right direction, there is still a question as to whether the proposal will be accepted by the international community of States. Early indicators suggest that a 'severance rule' will not sit easily with all States.[120] Pellet, too, acknowledges that 'practice only will be judge of [the Guide's] adaptation to the needs of the international community'.[121] The lack of a consistent practice by States as to how invalid reservations should be handled has thus far impeded resolution of the issue despite the clear growth in the recognition of the severability principle by States. Outwith the ILC and the treaty bodies the one point that is undisputed about the consequence of an invalid reservation is that there is no settled practice or common agreement on how to resolve the issue particularly in the context of State-to-State treaty relations.

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[118] Particularly to HRC General Comment No. 24.
[119] Draft Guide to Practice (n 28) 3.3, commentary para 6.
[120] Comments by Germany and the United States in ILC, 'Reservations to Treaties, Comments and observations received from Governments' (2011) UN doc A/CN.4/639, paras 149-50 and 170-82 and compare with, Comments by El Salvador and Finland, paras 135-36 and 138-45; UN Treaty Collection (n 32) Sweden's objection to El Salvador's reservation to the Disabilities Convention; UNCHR 'Observations by the Governments of the United States and the United Kingdom on Human Rights Committee General Comment No. 24 (52) relating to reservations' UN doc A/50/40 (1995).
[121] A Pellet, 'The ILC Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur' (2013) 24 European Journal of International Law 1061, 1094.

There is another cause for hesitation regarding the ILC's new predilection for severance. Notably, in the intervening period between adoption of the draft guidelines and the finalized guidelines several States commented on the consequences of an invalidity determination on a State's consent to be bound, a problem that has been recognised throughout the debate on severability. From the viewpoint of some States, the main concerns envision issues with the status of the reserving State,[122] which would be evaluated following severance of a reservation under Guide to Practice 4.5.3. Reading guideline 4.5.3 alone there seems to be at least initial closure on the issue of consequence for an invalid reservation. However, the commentary to draft guideline 4.3.7 (finalized guideline 4.3.8) makes clear that a State may not be compelled to comply with a treaty without the benefit of its reservation. Relying on the logical application of the principle of mutual consent the commentary suggests that a State cannot be bound–the reservation severed–any further than it is willing to be.[123] Both the draft guideline (4.3.7) and the finalized guideline (4.3.8) specifically address valid reservations. However the commentary to draft guideline 4.3.7 implies that due to the principle of mutual consent even an impermissible reservation cannot be severed. In a bid to reconcile the existence of invalid reservations and the principle of mutual consent the ILC relies on the permissibility doctrine. The permissibility doctrine dictates that the concrete consequence of an impermissible reservation is that it is null and void, a position supported by the treaty bodies.[124] As previously indicated, this position gives no definitive guidance as to what entity has the final authority to conclude that a reservation is

[122] See, for example, comments by Australia, Austria, Bangladesh and Finland in ILC (n 120) paras 113-18, 131 and 133.
[123] Draft Guide to Practice (n 28) 4.3.7, commentary paras. 1-3.
[124] UNCHR 'Report on nineteenth meeting of the Chairpersons of the human rights treaty bodies: Report of the sixth inter-committee meeting of human rights treaty bodies' (2007) UN doc A/62/224, Annex, para 48(v), endorsing the recommendations of the working group recorded in Chairpersons of the HRTBs, 2007 Report on Reservations UNCHR (n 112) para 18.

invalid. Thus the ILC guidelines provide a dizzying cyclical debate that continues the question regarding the ultimate consequence for an invalid reservation.

Furthermore, the presumption of severability amounts to an extraordinary right of denunciation for the reserving State that does not want to be bound by the treaty without benefit of an invalid reservation. This extraordinary right, if engaged, may require further justification as the Vienna Convention exhaustively enumerates the grounds upon which a State may terminate the operation of a treaty in Article 42(2); thus it is arguable that the treaty to which the denunciation is proposed would need to be evaluated to determine whether this was possible in law. An alternative view is that the State serving notice under Guideline 4.5.3(4) is actually claiming that its entire consent to be bound is nullified, but this examination will not be continued here.[125]

The work of the treaty bodies has not proved to advance an alternative resolution to the consequences issue as it follows the views of the ILC. In multiple reports, the working group on reservations, which was established to examine the practice of human rights treaty bodies, discarded other options for consequences of an impermissible determination and voiced solidarity with the ILC conclusion that the impermissible reservation would be severed unless a contrary intention could be proved:

> *The consequence that applies in a particular situation depends on the intention of the State at the time it enters its reservation.* This intention must be identified during a serious examination of the available information, with the presumption,

[125] For argument along this line, see Bradley and Goldsmith (n 85).

which may be refuted, that the State would prefer to remain a party to the treaty without the benefit of the reservation, rather than being excluded.[126]

Thus, according to the ILC and the UN human rights treaty bodies, the consequence resulting from an invalid reservation appears to be that it will be severed from the instrument of ratification and the State will not benefit from the reservation unless the State otherwise chooses to forgo treaty membership. If the State opts to withdraw from the treaty rather than maintain its membership without the benefit of the reservation it is unclear as to whether the State will be bound to the obligation against which it reserved for any existing claim as a result of validity or the reserving State will be treated as if it had never been party to the treaty. If the former, then the overall aim of the reservation policing system--the object and purpose test--achieves its intended purpose; if the latter, then it seems that there is little certainty for State Parties to any treaty as a reserving State could withdraw from membership in the event of a dispute where a validity ruling does not go its way. This is surely not a logical direction for treaty law to take and Pellet concedes that it was the 'least worse possible' solution.[127]

## V. REFLECTION ON THE CURRENT TREND

What does the noticeable uptake of severability across the international community mean for international law? Currently, the consequence of an invalid reservation remains unsettled. The ILC, the treaty bodies and an increasing number of States favour severability. While this is a welcomed result for human rights advocates in particular,[128] it remains to be seen whether a majority of States will fall in line with this point of view. If the number of States concurring with

[126] UNCHR 'Report of the Chairpersons of the human rights treaty bodies on Reservations' (2006) UN doc HRI/MC/2006/5, para 16,emphasis added.
[127] Pellet (n 121) 47.
[128] Though a favourable result for the international human rights regime in general, the author does not suggest that even without reservations all States fulfil their human rights treaty obligations.

the principle of severity grows it would facilitate a shift from the traditional view of absolute State sovereignty toward a more conscientious approach of assessing reservations. It is also unclear whether the practice will be exercised in non-human rights treaties. The one clear point is that unless a definitive view is taken on the validity of a reservation, it seems that there can be no resolution of the issue of consequence which leaves the obligations of the State in limbo. The lack of settled practice on the international level signifies an area of treaty law ripe for development which may be why an increasing number of States are opting to outline severance in their objections to invalid reservations and why the ILC ultimately included severability in the Guide to Practice.

The best way to easily address concrete consequences is to establish a final arbiter on reservation validity so that the legal effect is unquestioned.[129] As it stands, States may diverge on the issue of validity. Identifying a final arbiter is difficult in light of the competing States and organs deemed competent to assess reservations. The ILC took special care in its Guide to Practice to not give preference to one organ over the other; Contracting States, dispute settlement bodies and treaty monitoring bodies are equally invested with the ability to assess validity.[130] Regardless of which organ makes the assessment, one reasoned determination of invalidity should put the reserving State on notice that it may not rely on the reservation.[131]

*A. Potential Responses to Severance*

In specific relation to invalid reservations it is important to note that the stark positions of nullity and severance could benefit from more nuanced approaches that allow the reserving State to cure the defective reservation or its position as a State Party and, therefore, preserve State consent.

[129] For an examination of the determinative function see KL McCall-Smith, 'Reservations and the Determinative Function of the Human Rights Treaty Bodies' (2011) 54 German Ybk Intl L 521.
[130] Guide to Practice (n 2) 3.2.
[131] This excludes objections not related to invalidity, such as political or diplomatic reasons.

Providing alternatives would make severance seem less a challenge to State sovereignty. Multiple options to address the invalid reservation have been suggested: firstly, the State may withdraw the offending reservation; secondly, the State may denounce the convention (where possible) with the possibility of re-acceding with a compliant reservation (where possible); or, finally, the State may amend the defective reservation *a posteriori* so as to comply with the opinion of the organ exercising the determinative function.[132]

*1. Withdrawal*

Vienna Convention Article 22 outlines the procedural aspects for withdrawing reservations. These guidelines are mere practicalities in the event that a State *chooses* to withdraw a reservation following an objection. In the event that a final determination is made on invalidity, the same result outlined by nullity and severance can be achieved by inviting the reserving State to withdraw its reservation. Withdrawal is the more State-sensitive approach to eliciting a consequence for a reservation and is most often employed by the treaty bodies when they review periodic reports. This option was taken recently by Pakistan in response to the multitude of objections made to its reservations to the ICCPR, particularly in reaction to the reservation to Article 40 regarding the monitoring function of the HRC.[133] Though the legal effect is precisely the same as severance, the more genteel terminology allows the reserving State to take control of the situation and 'elect' to withdraw the invalid reservation rather than have it severed.

*2. Denunciation*

[132] H Golsong, 'Les reserves aux instruments internationaux pour la protection des droits de l'homme', cited in PH Imbert, 'Reservations and Human Rights Conventions' (1981) 6 Human Rights Review 28, 45; see also Macdonald (n 50) 448.

[133] UN Treaty Collection (n 32) Reservations by Pakistan (23 June 2012) and Objections to Reservations to the ICCPR, for example, by Latvia and Slovakia, which outlined severance as the consequence), Ireland , Italy, and the Netherlands, to name a few.

The least attractive option, but an option nonetheless, would be denunciation of the treaty if the reserving State deemed the reservation an essential feature of its consent to be bound. If the State formulating an invalid reservation chooses not to withdraw the offending reservation and cannot otherwise prove it is essential to its consent to be bound as outlined by the ILC guidelines introduced above, then the State could denounce the treaty. The obvious problem for the denunciation option will be that not all treaties include a provision for denunciation, such is the case with the ICCPR. For this reason, the legality of this option pursuant to international law is questionable for those treaties not contemplating the potential for denunciation.[134] This response is contemplated by the Guide to Practice in that States have 12 months to express the intention not to remain bound by a treaty without the benefit if a reservation that has been determined invalid.[135]

On 25 August 1997, North Korea notified the Secretary-General of its intent to withdraw completely from the ICCPR. Having no denunciation provision to guide it, the following month the Secretary-General informed North Korea via an *aide-mémoire* that its withdrawal would only be valid if all other State Parties to the Covenant agreed to the withdrawal.[136] This exchange reflects the practice of the Secretary-General to allow the treaty provisions to guide its responses to instruments deposited in relation to the treaties for which it is gate-keeper. To date the required unanimous consent has not been granted and it follows that North Korea is still bound by the ICCPR.[137] However, it has not since provided a periodic report to the HRC as required by the treaty.[138]

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[134] E Bates, 'Avoiding Legal Obligations Created by Human Rights Treaties' (2008) 57 ICLQ 751, 775-8.
[135] Guide to Practice (n 2) 4.5.3,para 4.
[136] See (12 November 1997) UN doc C.N.467.1997.TREATIES-10.
[137] During its review under the Universal Periodic Review, many States urged North Korea to comply with its obligations under the ICCPR and file its delinquent report. UNHRC, 'Report of the Working Group on the Periodic Universal Review, Democratic People's Republic of Korea' (2010) UN doc A/HRC/13/13.
[138] ibid.

The potential to denounce and re-accede with a reservation has been bandied about and has been done at least once in practice. In 1998, Trinidad and Tobago denounced and re-acceded to the Optional Protocol to the ICCPR with a reservation that the HRC would not be competent to consider communications by any prisoner under the sentence of death in respect of any matter relating to the prosecution, detention, trial, conviction, sentence or carrying of the of the sentence.[139] Seven State Parties objected to the reservation on the basis of incompatibility with the ICCPR as well to the 'propriety of the procedure' used by Trinidad and Tobago to make the reservation.[140] In a divided opinion in *Rawle Kennedy v. Trinidad and Tobago*, the HRC declared the application by Kennedy, a prisoner on death row, admissible despite the reservation thus severing the reservation.[141] It is not clear whether the reservation would have been unacceptable on otherwise 'proprietary' reasons had it been valid. Following this, Trinidad and Tobago once again denounced the Optional Protocol, this time without re-accession. Bates notes that at the cost of Trinidad and Tobago's membership in the Optional Protocol, 'the HRC arguably upheld the integrity of the system of human rights supervision'.[142] Though it may be questionable[143] whether this course is preferable to accepting an invalid reservation it must not be forgotten that there are many reasons for joining human rights treaties and it is ultimately up to the individual State to determine which sacrifices are most important, a reservation or treaty membership.

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[139] See UN Treaty Collection (n 32) Optional Protocol to the ICCPR (OP-ICCPR). Trinidad and Tobago acceded to the OP on 14 November 1980 and denounced the OP on 26 May 1998. It then re-acceded with a reservation on 26 August 1998. Following the decision in *Rawle Kennedy v Trinidad and Tobago*, HRC decision on Communication No. 845/1999 (31 December 1999) UN doc CCPR/C/67/D/845/1999,Trinidad and Tobago again denounced the OP on 27 March 2000.

[140] UN Treaty Collection (n 32) Objections to Reservations to the OP-ICCPR, citing the Netherlands objections. Many have argued that denunciation with re-accession does not comply strictly with the Vienna Convention but that particular question is out-with the parameters of the present research.

[141] *Rawle Kennedy* (n 139).

[142] Bates (n 134) 763.

[143] M Scheinen, 'Reservations by States under the International Covenant on Civil and Political Rights and its Optional Protocols, and the Practice of the Human Rights Committee' in I Ziemele (ed), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (Martinus Nijhoff 2004) 50-1.

These instances of denunciation led the HRC to issue *General Comment No. 26* on issues relating to the continuity of obligations to the ICCPR.[144] The HRC outlined that denunciation was guided by the provisions of each specific treaty and where there was no provision on denunciation the applicable rules of international law as reflected in the Vienna Convention are applicable. It pointed out that while the Optional Protocol to the ICCPR did specifically allow denunciation, as do other conventions such as CERD, as part of the 'International Bill of Human Rights' the ICCPR does 'not have a temporary character typical of treaties where a right of denunciation is deemed to be admitted'[145] where no such provision is provided. Therefore, while denunciation may be possible and may be a State's choice upon a determination that its reservation is invalid, each treaty will serve as a guide on the viability of this option.

*3. Reformulation*

While no rule exists in either the Vienna Convention or customary international law to support reformulation, practice has shown that it is a potential option. This was the approach followed by the ECtHR in *Belilos*[146] and on another occasion by Liechtenstein[147] to amend reservations to the ECHR. Despite the 'bizarre novelty'[148] of this approach, reformulation seems a preferred deviation from the strict rule that a reservation must be formulated simultaneously with the consent to be bound.[149] This approach would create a 'new rule of international law' and allow

[144] HRC, 'General Comment No. 26: Continuity of obligations' (1997) UN doc CCPR.C/21/Rev.1/Add.8/Rev.1 (1997).
[145] ibid para 3.
[146] Reformulation was actually suggested by Swiss counsel during the course of the case and Switzerland did produce a revised declaration following the final judgment on the case. See (1988) 31 Yearbook European Convention on Human Rights 5. It subsequently modified the reservation once again, see doc H/INF (89) 2, Information Sheet No. 24, 7-8.
[147] See Liechtenstein's reformulation of its reservation to ECHR, Art. 6(1), doc H/INF(92) 1, Information Sheet No. 29, 1.
[148] Bourguignon (n 50) 383.
[149] Korkelia (n 79) 460-1; Schabas (n 5) 77-8.

'subsequent modification of reservations in order to render them compatible with the object and purpose of the instrument'. [150]

Allowing reformulation of a reservation following a declaration of invalidity encourages ratification 'by assuring new parties a degree of certainty as to the consequences and effects of any reservations'[151] in that a State would have the opportunity to correct any deficiencies. Both the CEDAW Committee[152] and the treaty body overseeing the Convention on the Rights of the Child[153] have voiced support for the prospect of modifying errant reservations; the potential of the practice has also been recognised by ICCPR State Parties in their objections to invalid reservations.[154]

The reformulation approach was employed by Malaysia in relation to the original reservations it made to CEDAW. On 6 February 1998 it notified the UN Secretary-General that it was withdrawing its reservations to CEDAW Articles 2(f), 9(1), 16(b), 16(d), 16(e) and 16(h) and at the same time modifying its reservations to Articles 5(a), 7(b), 16(1)(a) and 16(2).[155] The Secretary-General's response to the modifications suggests that reformulation is a potential despite no acknowledgement in the Vienna Convention:

> In keeping with the depositary practice followed in similar cases, the Secretary-General proposed to receive the modification in question for deposit in the absence

[150] Schabas (n 5) 77. This idea was supported by Judge Valticos of the ECtHR in his dissenting opinion to the *Chorherr v Austria*, European Court of Human Rights Series A No 266-B (25 August 1993) para 42.
[151] Schabas (n 5) 78; see also Schmidt (n 27) 33.
[152] UN Committee on the Elimination of Discrimination against Women, 'Statement on reservations to the Convention on the Elimination of All Forms of Discrimination against Women' (1998) UN doc A/53/38/Rev.1, 49, para 18.
[153] UNCHR 'Chairpersons of the human rights treaty bodies Report on Reservations' (2009) UN doc HRI/MC/2009/5, 4.
[154] See, for example, UN Treaty Collection (n 32) the UK's objection (28 June 2011) to the reservations made to the ICCPR by Pakistan where it suggest that it would reconsider its objections if Pakistan modified its reservations.
[155] On 19 July 2010 Malaysia withdrew the reservations to Arts 5(a), 7(b) and 16(2).

> of any objection on the part of any of the Contracting States, either to the deposit itself or to the procedure envisaged, within a period of 90 days from the date of its notification (21 April 1998), that is to say, on 20 July 1998.[156]

On 20 July 1998, France filed its objection to the modifications on the basis of incompatibility with the object and purpose of the treaty and as a result the modifications were not accepted. The Netherlands also filed a response but did not expressly reject the modifications. Neither objection addressed the actual procedure of reformulating or modifying existing reservations, thus it seems that reformulation could be accepted in practice.

The following year the Maldives also submitted a modification to its original reservations to CEDAW. Responding in the same vein as to the Malaysian modification, the Secretary-General set a date of 23 June 1999 as the final date upon which objections to the modification could be received. No objections were received by the deadline and the reformulated reservations were accepted for deposit. Subsequent to the deadline, both Finland and Germany responded by way of objection but only Germany specifically indicated its rejection of the modification insisting that the modification was in fact a new reservation to Article 7. However, in light of the expiration of the deadline for objections, the reformulated reservations are now in place. Notably, the reservations for which both Malaysia and the Maldives sought modification were ones to which objections highlighting their incompatibility had previously been filed.

Surprisingly, the ILC has little to say on the concept of reformulation in the Guide to Practice except in the context of a partial withdrawal.[157] The ILC does recognise, at least in relation to the succession of States, that the Vienna Convention is flexible enough to

[156] UN Treaty Collection (n 32) CEDAW, n 36.
[157] Guide to Practice (n 2) 2.5.10.

accommodate a wide variety of practices and has generally allowed succeeding States to reformulate reservations originally made by their predecessors.[158]

Though technically a reservation must be made at the time of ratification or accession, a progressive dimension seems slowly to be creeping into reservations practice with regard to modification as indicated both by the reaction to notices of modification by the UN Secretary-General as well as practice within the European regional system. As noted by the Council of Europe Secretariat it must be understood that the reformulation cannot expand the original reservation.[159] In order to be permissible, the reformulated reservation must also comply with Vienna Convention Article 23 in that it could be interpreted as a partial withdrawal.

Reformulation is a particularly appealing possibility in light of the individual complaints procedure within the treaty body system whereby a State may only be notified of the invalidity of its reservation years after making it. The same is true if the reservation is reviewed by a dispute settlement body. Reformulation would provide the State the opportunity to adjust its reservation in order to achieve its originally intended or narrowed objective though this will not preclude any existing claim falling under the umbrella of an invalid reservation. These modifications would obviously remain subject to the existing standards of review on validity and, unlike reservations made at the time of ratification, would not be accepted by the depositary in the event of a single objection, as was the case with Malaysia's reformulated reservation.

Another technical point is that reformulation could only apply to previously formulated reservations. From a procedural standpoint this includes only those reservations made simultaneous to ratification of a treaty and does not include late reservations. Bahrain attempted

[158] Draft Guide to Practice (n 28) 5.1 and commentary para 19. Specifically referring to the 1978 Vienna Convention. See also Pellet (n 121) 33.
[159] PTB Kohona, 'Some Notable Developments in the Practice of the UN Secretary-General as Depositary of Multilateral Treaties: Reservations and Declarations' (2005) 99 AJIL 433, 435; J Polakiewicz, *Treaty-Making in the Council of Europe* (Council of Europe Publishing 1999) 96

to file a reservation to the ICCPR over two months after it ratified the Covenant in September 2006. Fifteen State Parties[160] objected to this attempt to file a late reservation and the objections were primarily based on the violation of the Vienna Convention requirement that a reservation be made upon ratification (Article 2(1)(d)) but most also noted the general incompatibility of the reservation with the object and purpose of the treaty.

Marginally departing from the traditional Vienna Convention approach, the ILC appears to accept the possibility of formulating late reservations in the Guide to Practice.

> *2.3. Late formulation of a reservation*
>
> A State…may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty, *unless* the treaty otherwise provides or none of the other contracting States…opposes the late formulation of the reservation. (emphasis added)

However this is a separate concept and simply filing a reservation as an afterthought is not contemplated in the context of the reformulation option discussed here even if the option of filing a late reservation has not been completely ruled out in theory. This distinction between a reformulation and a late reservation may seem like splitting hairs but in light of the existing lacunae in the Vienna Convention reservations regime there is a compelling reason to avoid deviations from the strict definition of a reservation which would further discombobulate the system.

## VI. FINAL REMARKS

[160] Objecting States included: Australia, Canada, Czech Republic, Estonia, Hungary, Ireland, Italy, Latvia, Mexico, Netherlands, Poland, Portugal, Slovakia, Sweden and the UK. Four of the objections were outwith the twelve month period for filing objections though it is unclear that this would matter since in any event the attempted reservation did not comply with the Vienna Convention.

The *Genocide Opinion* recognised that State sovereignty is challenged when States police the validity of reservations among themselves and where a State may be prevented from unilaterally modifying its treaty obligations; however, the Court was unwilling to completely sacrifice treaty integrity to allow absolute State sovereignty. By opting for a hybrid reservation/objection system and fostering a system that perpetuates the absence of a true legal consequence when an invalid reservation is made to a treaty, the ICJ opened the door for a new reservation practice to develop.

The traditional principles of permissibility and opposability that often guide inter-State treaty relations yield variable results depending on the type of treaty and in relation to human rights treaties the impact on State-to-State treaty relations is negligible. A large number of reservations of questionable validity remain attached to the core UN human rights treaties. Whilst this reality has little impact on horizontal inter-State relations, the third-party beneficiaries of the obligations suffer detriment because it is unclear as to which rights they are entitled. If treaty law can develop rules to clearly outline the consequence of an invalid reservation then treaty law would be more coherent and rights at the domestic level could be better defined. Severing a reservation is a clear consequence in response to a determination of invalidity.

The ECtHR was the first organ to advance severing invalid reservations. The HRC picked up the concept in *General Comment 24* as did the IACtHR in multiple decisions. Each instance was met with different responses by States. Within the European system the principle of severance originally responded to reservations that failed to meet structural requirements set forth in the ECHR. The HRC proposition broadened the scope to include reservations that were deemed invalid for failure to meet the strictures of the object and purpose test. All of these organs responded to reservations to human rights treaties specifically responding to the non-

reciprocal nature of the obligations. The intention was to assist rights-holders understand their entitlements under the respective treaties by determining which obligations were owed by the State. The human factor undoubtedly spurred these organs into action but claims that severance is *lex specialis* in the human rights treaty regime ignores evolving State practice.

While still controversial, there is a marked uptake of the principle that States will be bound to a treaty without the benefit of an invalid reservation. Sprinkled throughout reservation and objection practice post-1970 are instances of States adhering to the severability principle as a necessary extension of the permissibility doctrine. To curb reservations in general and foster more universal agreement, many treaties have been adopted under a consensus and further opt-in agreement procedure in lieu of the majority voting plus reservations approach followed in the human rights regime. Ultimately both are attempts to facilitate compromise within a growing international system.

This research highlights that the problem of invalid reservations is confined primarily to reservations to human rights treaties. While it is difficult to dismiss the reality that severability developed in direct response to reservations made to human rights treaties, the inclusion of severability in the ILC Guide to Practice suggests that the potential of the practice cannot be ignored. Following 18 years of debate, the ILC's conclusion that an invalid reservation may be severed coupled with the shift in contemporary State objection practice indicates that perhaps a change in treaty law is on the horizon and that this principle is more accurately depicted as *lex ferenda*. With the increasing number of norm-creating and regulatory treaties it is important to reflect on the evolving recognition of severability. States have been put on notice that they no longer remain able to redefine treaty obligations unilaterally without considering the consequence of an invalid reservation.